

July 1992  
Question 2

Dan, a student in a state university law school, posted on the law school bulletin board the following typed notice:

Professor James gave an "A" grade last semester to a woman in return for sexual favors. The facts are widely known and talked about.

The statement about sexual favors was true of a different teacher also named James (Teacher James) who had been fired from his job at a nearby college as a result. Dan knew that Teacher James had been fired but did not know why. Dan honestly believed that Professor James was the one who had given the "A" grade in return for the sexual favors. On the day after Dan posted the typed notice, Ned, editor of the Daily Record, the local newspaper, published in the Daily Record a clear picture of the posted notice, commenting only that the notice was posted on the local law school bulletin board.

Professor James had given only one "A" grade the previous semester. This was to a woman named Pam, who had never been intimate with Professor James. Her grade had appeared alongside her secret examination number on Professor James' list of grades, which had been posted on the bulletin board. Pam was never identified publicly by Professor James or the school as the recipient of the "A" grade.

1. What legal claims and defenses should be asserted in a suit by Professor James against Dan, Ned, and the Daily Record, and how should the claims and defenses be resolved? Discuss.
2. What legal claims and defenses should be asserted in a suit by Pam against Dan, Ned, and the Daily Record, and how should the claims and defenses be resolved? Discuss.

## ANSWER A TO QUESTION 2

### Professor James v. Dan

#### Defamation

Professor James no doubt will bring a defamation action versus Dan for Dan's statement in the printed message. To succeed at common law (CL), Professor James would show 1) a defamatory statement concerning Plaintiff (P), 2) publication, and 3) damage.

A statement is defamatory if a substantial group of respectable people would find it shameful, disgraceful or humiliating. No doubt a law professor, or any teacher, would be humiliated, disgraced and shamed by allegations of sexual improprieties, especially sex for grades, a gross breach of trust and academic integrity. Thus, the statement accusing Professor James of sex for grades was defamatory.

As the statement stated Professor James, it is clearly concerning P, Professor James. Thus, no colloquium need be pled or proven. Also, no inducement or innuendo need be pled or proven as the statement is defamatory on its face.

Publication occurs when the statement is communicated to at least to one other person who understands it. Here, as the statement was on the bulletin board at school and was selfexplanatory, it was no doubt published.

At CL for libel, damages could be presumed. In any event, even modernly as the statement is libel per se, damages could be presumed, subject to possible constitutional limitations.

Truth was a defense at CL, but since the statement was false, as the facts clearly show, Dan could not use this defense.

The U.S. Supreme Court in the 1960's began to have concerns over the CL strict liability type rule for defamation. Out of concern for the First Amendment, the court altered the rules of defamation. The court said that if the statement which is defamatory is concerning a public official or figure, then the P must show, in addition to the above-referenced elements, that the statement was false and was made with actual malice.

A public official is a public officer who has or appears to have substantial control over public affairs. Per this definition, a law professor, despite beliefs to the contrary, is not a public official.

A public figure can be of two types: voluntary or involuntary. For a person to be a voluntary public figure, it must be shown that they voluntarily injected themselves into a public controversy for the purpose of affecting the outcome. Here, there are no facts to indicate Professor James has injected himself voluntarily into a controversy, and thus is not a voluntary public figure.

An involuntary public figure is one who has achieved such pervasive fame and notoriety as to be known by the general public. The Supreme Court has not held anyone to a public figure involuntary status and the facts indicate no justification for labeling Professor James as one.

As Professor James is not a public figure or official, actual malice and falsity are not required, and he can recover damages from Dan.

Professor James may want an injunction to remove the sign from the school, if it is still up. He must show inadequacy of the legal remedy, feasibility of drafting and enforcing a decree, a property right (a very watered down requirement) and a balancing of hardships in his favor.

While the courts are reluctant to enjoin speech when the speech has been determined by a judge to be defamatory, it may get less protection. Inadequacy is shown by the fact that if the sign is not removed, he must keep suing and thus multiplicity of suits is inadequate. It is feasible by saying simply, "Take it down." Property rights is a very loose concept and as such, his reputation probably suffices. This does not appear to be a large balancing problem, since a teacher's career surely outweighs the right to defame.

Nonetheless, courts are very hesitant because of the First Amendment to issue speech injunctions, so Professor James may be unsuccessful.

### Intentional Infliction of Mental Harm

To recover under this tort, Professor James would have to show the intentional doing of an outrageous act which causes actual severe mental suffering. Here, as Dan intentionally (with desire or knowledge and with substantial certainty that the act will cause mental suffering) put the defamatory statement on the board, he could be sued on this theory.

However, as Dan honestly believed the statement his publication may not be seen as outrageous, an act that exceeds all bounds tolerated by society. If it does exceed the bounds, and if he can show actual severe mental suffering, then he can recover.

## False Light

This requires proof of the same elements as defamation except that the statement need not be defamatory, only false and embarrassing. Here, clearly the facts show the statement was false, and it is without question embarrassing. Thus, Professor James could recover from Dan on this theory.

## Professor James v. Ned

### Defamation

Again, Professor James must show a defamatory statement concerning P, publication and damage. However, Ned, as publisher of a newspaper, will be seen as a media defendant. While courts often give the press no special favors, it appears that where a private person (see Professor James discussion supra) is suing a media defendant for defamation, there is a fault requirement.

Defamatory statement concerning P is the same discussion as for Dan.

Publication: As the same definition applies, the statement was clearly published by printing it in a daily newspaper. Someone in a city would understand it. Ned may argue that they did not make the statement but that Dan did. However, one who republishes a defama

-12-

tory statement is just as culpable as the original publisher. It should be noted that under the single publication rule, all copies of an edition of a publication are considered one published statement. As such, as long as one edition was printed, Ned and the paper are subject to one defamation action.

Damage: Discussion is the same as for Dan, except that versus a media defendant, the court may very well require proof of damages, especially if the fault requirement is met via negligence as discussed infra.

Fault: Professor James must show the statement was negligently made, or made with actual malice (that is with knowledge of falsity, or with substantial doubts subjectively as to its truth, but made anyway).

While a newspaper has no general duty to be certain of the accuracy of all that it publishes, clearly it knew the Professor James statement had a great potential for harm. They have a duty to act reasonably, the breach of which is negligence. Here, Ned did not even call the school or in any way verify the statements. As such, they were probably at least negligent. There are no facts to indicate Ned knew the statement was false or subjectively doubted its truth.

Thus, he probably acted negligently, but not with actual malice. Where the fault is negligence, courts often do not allow presumed damages. If Professor James can prove damage to his reputation, which is what a defamation action provides for, he can probably recover versus Ned. As the statement was false, Professor James probably has met his burden of proof.

The court would almost certainly not order an injunction or retraction, as the First Amendment is again involved.

Intentional infliction of mental harm - same discussion as

for Dan. False light - same discussion as for Dan.

#### Professor James v. Daily

Record The discussion for Ned is  
the same for the Daily Record.

#### Pam v. Dan

Defamatory statement: Sleeping with a professor for grades is clearly defamatory. Also, it falls into a special category of libel where damages are generally presumed, unchastity in a woman. As it would require possibly extra facts to show the actual defamatory implication, she may need to plead the extrinsic facts (inducement) required, plus its defamatory meaning (innuendo). However, it probably is libel on its face, so this may not be required.

Concerning P: Here, Pam is not referred to by name and as such, she must prove through facts (colloquium) that the defamatory statement concerns her.

A statement is concerning a person if a reasonable person who knew the person/victim would know the statement was concerning the victim. While Pam's "A" was secret on the board of grades, no doubt people who knew her knew she received an "A", since law students brag over such achievements; as such, the statement probably attaches to her. She is clearly not a public official or figure, so there is no fault requirement.

- 13-

Publication: Same as Professor James v. Dan.

Damages: While most lawyers would presume libel damages, since this regards unchastity in a woman, damages will no doubt be presumed. She should recover damages for defamation. As the statement is false, truth will be no defense.

The same injunction problems are here as with

Professor James. Intentional infliction of mental harm:

Same as James v. Dan. False light: Same as James v.

Dan.

### Pam v. Ned and Daily Record

Defamation, intentional infliction of mental harm, and false light: Again, the discussion is the same as for Dan, but for defamation versus the media defendants, the fault requirements are present. This should be satisfied as discussed with Professor James v. Ned and Daily Record.

## ANSWER B TO QUESTION 2

### 1. SUITS BY PROFESSOR JAMES

("PROFESSOR") A. Against Dan

Dan may be liable to Professor for defamation.

To recover for damages, for a plaintiff to recover in defamation, the plaintiff must prove that the defendant made a defamatory statement of fact against the plaintiff. A statement is defamatory if it has a tendency to harm plaintiff's reputation.

Plaintiff may only recover for statements of fact, not opinion. Something is a statement of fact if it is readily susceptible to proof by investigation. Furthermore, the statement must be against a single plaintiff or a very small group of plaintiffs. Libel against a large group is not recoverable.

Here, the statement said that Professor gave an "A" grade in return for sexual favors. This statement would almost certainly harm a professor's reputation, and is therefore defamatory on its face. The statement is specific

about the name, the grade given, the time the grade was given, and the fact that the grade was exchanged for sexual favors. It also stated that the previous words were "facts." This statement, therefore, is sufficiently specific and susceptible to a determination of truth or falsity through research that is a statement of fact rather than opinion.

The statement only concerns Professor and one woman. Therefore, it is not large group libel.

The second requirement for recovery under defamation is that if it is the type of libel or slander requiring special proof of special damages, i.e., actual pecuniary loss, then plaintiff must prove actual pecuniary loss. If the defamation is slander, then actual damages are

-14-

required to be proved. If the defamation is libel, then damages are presumed, and plaintiff need not prove them. Libel is written, slander is spoken. Here Dan posted a typed notice. Therefore, it is libel since it is written, and no damages need be proved.

The third requirement for recovery under defamation is that the plaintiff make an intentional or negligent publication of the statement. Here, Dan posted the typed notice. Therefore, he can be said to have intentionally published the notice.

There is publication if the statement is made to at least one person who is not the plaintiff. Since the notice was posted on a law school bulletin board, it almost certainly was published to more than one person. Anyone walking by the bulletin board who stopped to read the notice would have the statement published to them.

If the above requirements are satisfied, the burden shifts to defendant to prove a defense. The only possible defenses available to Dan are truth and consent. Here, the statement was false as to Professor. It was only true as to Teacher James. Therefore, the defense of truth is not available. Furthermore, nothing in the facts suggests that Professor consented to having this defamatory statement made about him. Therefore, no common law defenses apply.

Dan will assert that Professor is barred from recovery by constitutional (First Amendment) barriers. Dan will first assert that the New York Times standard applies to this case. The New York Times standard applies when the plaintiff is a public figure, the matter concerned in the statement is a matter of

public interest, and possibly that the defendant is a media defendant. Public figures can be "general", meaning that they are generally notorious and any statement about them, regardless of the subject matter, is subject to the New York Times standard. Public figures may also be "limited", in other words, they are public figures only with respect to particular issues. As to those issues, the New York Times standard applies.

If this standard applies, plaintiff must prove malice, meaning that the defendant had actual knowledge of the falsity of the statement or reckless disregard of its truth or falsity. "Reckless disregard" means that defendant subjectively entertained serious doubts about the truth or falsity of the statement.

Here, Professor is a professor at a state law school. Dan will argue that he is a limited public figure, and that the statement concerns the issue over which he is a limited public figure. However, employment at a state university, even as a professor, probably is not sufficient to make Professor a limited public figure.

If the New York Times standard applies, Dan knew that Teacher James had been fired but did not know why, and Dan honestly believed that it was Professor James who had given the "A" grade in return for sexual favors. Although Dan had reason to investigate why Teacher James had been fired, especially given the similarity of the names of Teacher James and Professor, he probably does not satisfy the reckless disregard test, especially since he honestly believed it was Professor James who committed the act in the statement.

Therefore, if the New York Time standard applies, Professor is probably barred from recovery from Dan.

If the New York Times standard applies, plaintiff is also required to prove falsity.

-15-

If the plaintiff is not a public figure, but the statement concerns a matter of public interest, then the Gertz standard applies. Plaintiff would then have a choice to prove New York Times malice, or to prove negligence. If plaintiff chooses to prove mere negligence, then plaintiff must also prove actual damage, and plaintiff is not entitled to punitive damages.

Here, as stated above, Professor probably cannot prove New York Times malice. However, Dan did know that Teacher James had been fired and did not know why. Although Dan honestly believed that it was Professor James who

did the act of giving the "A" grade, he probably should have investigated, and is therefore negligent in failing to investigate whether it was Professor James or Teacher James who committed the act of giving the "A" grade. Since Professor can prove negligence under the Gertz standard, he can recover for defamation if he proves actual damage. He must also prove falsity. He is not entitled to punitive damages.

B. Against Ned

Ned may also be liable to Professor for defamation. The discussion regarding defamatory statement of fact against plaintiff from above is applicable here. The discussion from above regarding whether the statement is the type of libel or slander regarding proof of special damages also applies here.

The intentional or negligent publication requirement is satisfied by repeaters of another's defamation.

Furthermore, there is publication, since Ned must have told employees at the Daily Record of the statement. Otherwise, the Daily Record could not have published it.

The defense available to Ned, perhaps, is the neutral reporting privilege. Reporters have a qualified privilege to report on the events at a public meeting. They must only report what was actually said. Here, Ned reported what was on the bulletin board. He did not give his own commentary. Therefore, the neutral reporting privilege is probably applicable.

Therefore, Professor cannot recover from Ned for

defamation. C. Against Daily Record

The discussion from above with regard to defamatory statement of fact, presumed damages, and intentional or negligent publication, is applicable here, and incorporated by reference.

As with Ned, the neutral reporting privilege is applicable to the newspaper as well for the same reasons.

However, even if the neutral reporting privilege is not available, for example, because it is held to apply only to meetings and not bulletins, the newspaper may also have the qualified defense of a retraction statute. Retraction statutes do not bar recovery, but merely limit recovery, where the

newspaper prints a retraction of the defamatory article. Damages recoverable are only those that were caused during the period between the defamatory publication and the retraction.

[Note: Qualified privileges, for example, the neutral reporting privilege, are only available if they are not abused. There is abuse if there is actual common law malice, i.e., ill will, or the publication is excessive.]

#### D. Privacy

Professor may have a claim for intrusion on his privacy against all three of the above defendants.

Plaintiff may recover for a statement that puts plaintiff in a false light. Recovery is available if the defendant publicizes false facts about plaintiff, which a reasonable person would object to, and, where the matter is of public interest, plaintiff must prove New York Times malice. Here, the publicizing requirement is satisfied, since the statement was not only published, but was publicized to a group of people. Since the statement was defamatory, it also puts the plaintiff in a false light. Statements about sexual favors in return for a good grade are almost certainly objectionable to a reasonable person.

However, since this is a matter of public interest to the students in the law school, and possibly to the public at large, and since it is a state university, New York Times standard applies. As stated above, it is not satisfied. Therefore, Professor may not recover for false light.

## 2. SUITS BY PAM

Pam may be able to recover for defamation.

As stated above, to recover for defamation, plaintiff must prove that a defamatory statement of fact was made against her.

A statement that a woman exchanged sexual favors for an "A" grade is almost certainly likely to harm the woman's reputation. Therefore, the defamatory requirement is satisfied.

Where the statement on its fact does not refer, to plaintiff, plaintiff must prove colloquium. In other words, she must prove that the statement was made about her. Here, Pam must prove not only that the woman referred to in the statement was she, but that at least one person knew that the statement referred to her. Since she was the only woman who got an "A" grade, the statement refers to her. However, it is not known whether at least one person

other than her knew that the statement referred to her in particular. She might prove this if she showed that somebody in the records office who knew her exam number also knew that she got an "A" grade and that that person in the records office also read the statement. It is not clear from the facts whether Pam could prove this.

The discussion regarding slander or libel requiring special damages is incorporated herein.

For the same reason that Pam has problems proving that the defamatory statement was against her, she also has problems proving intentional or negligent publication. She can show that the publication was intentional, since Dan posted the notice. However, she must prove that at least one person who read the statement knew that it referred to her.

The discussion regarding defenses, and constitutional barriers to recovery, applies here.

-17-

Therefore, if Pam can prove that at least one person who read the notice understood that it referred to her, then she can recover against Dan. If at least one person who read the newspaper understood that it referred to her, then she can recover against Ned and the newspaper.

